

SERVICE DATE - FEBRUARY 1, 2002

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42057

PUBLIC SERVICE COMPANY OF COLORADO D/B/A XCEL ENERGY
v.
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

Decided: January 31, 2002

In a verified complaint filed and served on defendant The Burlington Northern and Santa Fe Railway Company (BNSF), on December 20, 2000, the Public Service Company of Colorado d/b/a Xcel Energy, Inc. (Xcel), alleges that the rates to be assessed by BNSF on complainant's movements of coal from origins in the Powder River Basin (PRB) of Wyoming to Xcel's Pawnee Steam Electric Generating Station (Pawnee) near Brush, CO, exceed a maximum reasonable level.¹ Xcel alleges that BNSF possesses market dominance over the traffic and requests that maximum reasonable rates be prescribed along with other relief.² Xcel also requests an award of reparations equal to all amounts paid to BNSF for service to Pawnee in excess of maximum reasonable levels beginning January 1, 2001, plus interest.

This decision resolves certain outstanding procedural matters. Specifically, it grants two motions to compel production of documents in aid of discovery, grants a petition for issuance of a subpoena duces tecum to the manufacturer of electronic fuel gauges used by BNSF, and denies a petition for modification of the protective order adopted by the Board in a decision served on January 29, 2001.

PROCEDURAL HISTORY

On February 8, 2001, Xcel filed its First Motion to Compel Discovery Responses (First Motion to Compel) seeking an order to compel BNSF to produce copies of rail transportation contracts to be used in preparation of Xcel's stand-alone cost evidence. BNSF responded in opposition to the First Motion to Compel on February 28, 2001, arguing that an order compelling

¹ The service was provided by BNSF under a rail transportation contract that expired on December 31, 2000. As of January 1, 2001, the applicable rate is a trainload rate for movements in cars supplied by Xcel (Common Carrier Pricing Authority BNSF-90043).

² Xcel seeks a prescription of a common carrier rate for BNSF's rail transportation between the PRB mine origins and Xcel's Pawnee facility.

discovery was premature in advance of any agreement by the parties on the scope of Xcel's request. According to Xcel, its First Motion to Compel is now unopposed because the parties have agreed on the rail transportation contracts to be produced by BNSF.³ Xcel filed a Second Motion to Compel Discovery Responses (Second Motion to Compel) on August 17, 2001, specifically requesting an identified rail car lease, BF 10100.00. BNSF does not oppose this motion.⁴

On August 10, 2001, Xcel filed a petition requesting that the Board issue a subpoena duces tecum upon Wabtec Railway Electronics (Wabtec), the manufacturer of electronic fuel gauges used by BNSF. The petition for subpoena was filed in conjunction with Xcel's Amended Petition for Order Establishing Procedures for a Study to Measure Movement-Specific Locomotive Fuel Consumption (Amended Petition for Fuel-Study Procedures) filed the same day. BNSF replied in opposition to both petitions on August 30, 2001.

On November 14, 2001, BNSF filed a Petition for Modification of Protective Order (Petition for Modification) for the limited purpose of allowing it to use certain discovery material provided by Xcel in another pending rate proceeding, STB Docket No. 42056, Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company (TMPA v. BNSF). Xcel filed in opposition to the Petition for Modification on December 4, 2001.

DISCUSSION AND CONCLUSIONS

1. Motions to Compel.

Xcel's motions to compel, if granted, would require BNSF to produce agreements that, according to BNSF, contain confidentiality provisions prohibiting disclosure to third parties. BNSF asserts that a Board order to compel production of these agreements, subject to the terms of the protective order served on January 29, 2001, in this proceeding, would permit BNSF to disclose the requested agreements without violating the confidentiality provisions. Accordingly, subject to the terms of the protective order, Xcel's First Motion to Compel, as modified by the

³ See Letter filed by Xcel on October 23, 2001.

⁴ BNSF also filed a Motion to Compel Discovery Responses (BNSF Motion to Compel), on April 2, 2001, to which Xcel replied on April 30, 2001. By letter filed on April 17, 2001, Xcel informed the Board that the parties were negotiating a compromise that would narrow or eliminate the issues raised by the BNSF Motion to Compel. In its October 23, 2001 letter, Xcel reports that nearly all of the disputes covered by the BNSF Motion to Compel have been resolved by the parties in their discussions. BNSF did not respond. It is assumed that the issues raised by the BNSF Motion to Compel have been resolved. However, if BNSF does not agree, it is free to renew its motion, identifying those issues that remain unresolved by the negotiations and for which it still requires Board action to resolve.

parties' agreement on the specific rail transportation contracts to be produced, and Xcel's Second Motion to Compel, relating to lease agreement BF 10100.00, will be granted.

2. Petition for Subpoena.

Xcel's petition for a subpoena, if granted, would order Wabtec to produce documents relating to the operation and accuracy of the gauges installed on locomotives.⁵ Xcel has asked BNSF to make available fuel usage data obtained from the gauges as one component of a two-part protocol for measuring locomotive fuel use in this proceeding.⁶ According to Xcel, BNSF has refused to permit Xcel to collect these data, stating, among other reasons, that the gauges are unreliable or are an inaccurate measure of locomotive fuel consumption. Based upon oral representations by a representative of Wabtec and a company brochure advertising the gauges to be reliable and accurate to within 1%, Xcel seeks written documentation supporting these claims. According to Xcel, the reliability and accuracy of the gauges are contested issues, and information about the gauges is relevant and bears on an important aspect of the proceeding.

In its reply, BNSF opposes the issuance of the subpoena on the grounds that the requested information is not relevant and is not necessary for determination of the reliability or method of interpretation of data derived from the fuel gauges. However, in its reply to the Amended Petition for Fuel-Study Procedures, BNSF continues to challenge the accuracy of the fuel gauges.⁷ By placing at issue the reliability and accuracy of the electronic fuel gauges, BNSF may not now argue that information pertaining to these inquiries is not relevant. Moreover, it appears that the issue of the reliability and accuracy of the gauges is an issue with respect to the Amended Petition for Fuel-Study Procedures. As Wabtec has refused to produce documents relevant to this inquiry without permission from BNSF, and as BNSF has refused to authorize Wabtec to produce the documents, Xcel's petition for a subpoena will be granted.⁸

⁵ Xcel's request is limited to document production; Xcel does not seek to depose witnesses.

⁶ See Amended Petition for Fuel-Study Procedures.

⁷ BNSF questions Xcel's claim that the accuracy of the fuel consumption study would be improved by use of the electronic fuel gauges, stating, on pages 2-3, that "Xcel presents no reason to believe that a fuel study based on fuel gauge readings would be more accurate than an event recorder study, and there are reasons to believe that such a study would in fact be less accurate because of environmental factors that affect fuel gauge readings (like the effect of track slope where the measurement is made) that cannot be effectively controlled in the field."

⁸ Xcel may further amend its Amended Petition for Fuel-Study Procedures after analyzing the information received in response to the subpoena. A decision on the merits of the
(continued...)

3. Modification of the Protective Order.

The Petition for Modification and the reply to it were filed under seal, in accordance with the terms of the existing protective order. Accordingly, this discussion will be limited, revealing only what is necessary to explain the decision on this issue. BNSF seeks to modify the existing protective order to allow it to use a confidential Xcel study produced during discovery here in the TMPA proceeding. Specifically, BNSF wants to use the Xcel study to rebut a TMPA argument about the expected trend in coal transportation contract rates. In its reply, Xcel argues that “[g]ranted BNSF’s request would undermine the purpose of the protective orders in these proceedings to the point of destroying the protections afforded by them.”

In a few recent instances, parties in rate cases — without seeking permission to modify the relevant protective orders — have attempted to use confidential data from one proceeding to support their positions in another case. Parties should not use confidential materials in this manner, and therefore the Board will not be permitting the practice absent a formal request showing extraordinary circumstances. Here, BNSF has not demonstrated extraordinary circumstances or a compelling need that would justify modification of the protective order.⁹ Therefore, the Petition for Modification will be denied.

It is ordered:

1. Xcel’s First Motion to Compel, as modified by the parties’ agreement on the specific contracts to be produced by BNSF, is granted. BNSF is directed to produce the documents by February 11, 2002.

2. Xcel’s Second Motion to Compel is granted. BNSF is directed to produce lease agreement BF 10100.00 by February 11, 2002.

3. Xcel’s Petition for a Subpoena Duces Tecum is granted. Wabtec must comply with the subpoena by February 11, 2002.

4. BNSF’s Petition for Modification is denied.

⁸(...continued)

Amended Petition for Fuel-Study Procedures will be issued after BNSF has had the opportunity to reply to any further amendments by Xcel.

⁹ See CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company—Control and Operating Leases/Agreements—Conrail Inc. and Consolidated Rail Corporation, STB Finance Docket No. 33388 (STB served Aug. 5, 1997) (denying request to modify protective order to allow use in one case of confidential information produced in another case involving the same parties).

5. This decision is effective on its service date.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary